89-1589

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ALPHA WIRE CORPORATION, a New Jersey Corporation and PHILIP R. COWEN, individually and in his capacity as President and Chief Executive Officer of Alpha Wire Corporation,

Petitioners,

v.

PEARL SIEGEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Has the United States Court of Appeals for the Third Circuit adopted an improper standard for granting summary judgment in age discrimination cases that has the effect of shifting the burden of proof to the defendants?

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TABLE OF AUTHORITIES

PARTIES

All parties are listed in the caption. The parent of Alpha Wire is Alpha Holding Corporation.

OPINION BELOW

The opinion below is reported at 894 F.2d 50 (3rd Cir. 1990).

JURISDICTION

Jurisdiction of this Court is predicated on the judgment entered by the United States Court of Appeals for The Third Circuit on January 16, 1990. No order seeking rehearing was sought. Certiorari is sought pursuant to 28 U.S.C. §1254 (1).

STATUTE INVOLVED

This case arises under the Age Discrimination In Employment Act, 29 U.S.C. §621, *et seq.* (1982) (ADEA). The relevant provisions of this statute are:

> 29 U.S.C.
> § 623. Prohibition of age discrimination
> (a) Employer practices
> It shall be unlawful for an employer–
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

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§ 626. Recordkeeping, investigation, and enforcement

• • •

(c) Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring Such action shall terminate upon the commencement of an action by the Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

STATEMENT OF THE CASE

This case arises from defendants' termination of plaintiff's employment as part of a successful turnaround of a seriously troubled company. The District Court (Barry, J.), in a thoughtful opinion (A-13), concluded that plaintiff had raised no *genuine* issues about a *material* fact in response to defendant's motion. What conflicting evidence there is either relates to a nonmaterial fact, or did not raise a genuine issue, the District Court held.

Plaintiff Pearl Siegel is a former employee of defendant Alpha Wire Corporation. Defendant Philip R. Cowen is Alpha's president and chief executive officer.

During the mid-1980's, Alpha Wire became increasingly unprofitable. Cowen was hired to rescue the company. By the end of 1986 it became clear to him that his entire staff, and many employees at lower levels, were incapable of reversing Alpha's negative trends. Consequently, many employees (including Siegel) were terminated.

In Cowen's business judgment, Siegel had been both incompetent and disloyal to the corporation. Siegel of course disagreed and brought an action under the ADEA. Numerous state law claims were appended. Extensive discovery was taken.

The Honorable Maryanne Trump Barry, below, granted defendants' motion for summary judgment on the ADEA claim after the close of discovery. Lacking extraordinary circumstances, she dismissed the state law claims for lack of pendent jurisdiction. Siegel appealed.

The Third Circuit, calling the case "a close one" reversed and ordered a trial in an opinion by former Chief Judge Gibbons.

JURISDICTION OF THE COURTS BELOW

The district court's subject matter jurisdiction was invoked under the Age Discrimination In Employment Act, 29 U.S.C. §621, *et seq.* (1982). The Third Circuit had appellate jurisdiction under 28 U.S.C. §1291 (1982).

REASONS FOR ALLOWING THE WRIT

In the summary judgment trilogy, *Matsushita Electric Industrial v. Zenith Radio*, 475 U.S. 574 (1986), *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) this Court explained to the lower federal courts that summary judgment was not an aberrant procedure but an important part of the routine practice in the federal courts. Last term in *Wards Cove Packing Co. v. Atonio*, ____ U.S. ____, 109 S. Ct. 2115 (1989) this Court reminded lower federal courts that ultimately the plaintiff bears the risk of nonpersuasion in employment discrimination cases, although the

burden of going forward shifts with the various presumptions laid out by the Court's prior cases.

Notwithstanding these teachings of this Court, the Third Circuit has adopted a standard for summary judgment in favor of defendants in discrimination cases that essentially prevents its ever being granted. In the vast majority of reported discrimination cases presented to the Third Circuit in the last five years where district courts have granted summary judgment to defendants, the Third Circuit has reversed.[1]

This case therefore presents this Court with the question whether it is the district judges of the Third Circuit, or the Third Circuit itself, that is misreading the decisions of this Court.

This question has important systemic implications for the federal judiciary. Since 1969 the number of employment discrimination cases filed in the federal courts has increased by 2,166% – from 336 cases in 1970 to 7,613 in 1989.[2] Over the same period all other federal civil litigation has increased by only 125%. The bulk of this increase is due primarily to an enormous jump in wrongful discharge cases such as this one. For

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[1] The leading case is *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir.)(*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987). The others are *Chauhan v. Alfieri*, 1990 WL 17934 (3rd Cir. 1990); *White v. Westinghouse Elec. Co.*, 862 F.2d 56 (3rd Cir. 1988); *Levendos v. Stern Entertainment*, 860 F.2d 1227 (3rd Cir. 1988); *E.E.O.C. v. City of Mt. Lebanon, Pa.*, 842 F.2d 1480 (3d Cir. 1988); *Jackson v. University of Pittsburgh* 826 F.2d 230 (3rd Cir. 1987); *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988); *Graham v. F. B. Leopold Co.*, 779 F.2d 170, 172-173 (3rd Cir. 1985).

The few exceptions to this pattern are *Healy v. New York Life Insurance Co.*, 860 F.2d 1209 (3rd Cir. 1988), *cert. denied*, 109 S. Ct. 2449; *Jalil v. Avdel Corp.*, 873 F.2d 701 (3rd Cir. 1989), *cert. denied*, 110 S. Ct. 725 (1990); *Fowle v. C&C Cola*, 868 F.2d 59 (3rd Cir. 1989) (failure to apply); *Spangle v. Valley Forge Sewer Authority*, 839 F.2d 171 (3rd Cir. 1988) (constructive termination); *Hankins v. Temple Univ.*, 829 F.2d 437 (3rd Cir. 1987).

[2] All statistics are from the Federal Courts Study Committee, Tentative Recommendations For Public Comment (December 22, 1989) at 49.

example, cases challenging hiring practices outnumbered termination cases by 50% in 1966. But in 1985 this ratio was reversed by more than 6 to 1.

Thus, this case represents one of a vast number of cases that are clogging the arteries of our federal judicial system. Yet the standard adopted by the Third Circuit for summary judgment cases prevents weeding out those without merit at an early stage.

This Court granted certiorari in the leading *en banc* case of the Third Circuit that established this rigorous rule, *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893 (3rd Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987) but the case was dismissed pursuant to then Rule 53, apparently because of a settlement between the parties. This action would provide the Court an opportunity to address the problem it tried to address three years ago.

Stated simply, petitioner agrees with the district judges, and with Judge Hunter in dissent in *Chipollini*, that the Third Circuit has made a practice of ignoring the lessons of this Court on summary judgment and in the employment discrimination area, and has adopted a standard which makes it virtually impossible for defendants to achieve summary judgment in employment discrimination cases.

In concluding that this "close" case was sufficient to go to the jury, the Third Circuit relied on two pieces of purported evidence. (A-9 - A-10). First, it concluded that there was evidence from which a jury could conclude that the president of the corporate defendant used the phrase "old dogs won't hunt", and that the phrase showed age animus. Second, it concluded that the juxtaposition of this employee's prior good performance evaluations with the fact that reasons for the termination were articulated after the litigation commenced gave rise to an inference. Together these would be adequate to sustain a jury verdict in favor of plaintiff, the Third Circuit held.

The Third Circuit is wrong. Unlike the District Judge, the Third Circuit ignored entirely the context of this case. This was

not a solitary termination; it took place in the context of a reduction in force. The undisputed statistical evidence demonstrates that when the reduction in force is looked at as a whole, that there is no evidence of discrimination. The percentage of people terminated in the protected age group is the same as the percentage retained. This record creates a strong presumption of no age bias.

For plaintiff to prevail in this case, she must demonstrate that notwithstanding the evenhandedness with which management acted generally, there was particular age animus in her termination. The Third Circuit ignored this context.

Although Cowen denies ever having said "old dogs won't hunt",[3] we assume for the purposes of summary judgment that plaintiff can prove he said it. The only witness plaintiff had to his saying it was Mr. Czerniawski, plaintiff's former immediate supervisor.[4] But Mr. Czerniawski's own testimony demonstrates why this is of no help to plaintiff.

First, he testified he never heard the phrase used in relation to plaintiff. Second, he said that he understood the word "old" not to mean chronologically old but to refer to members of the former administration of the company, the *ancien regime*. In light of this testimony from a witness who made clear that he despises Mr. Cowen and likes Mrs. Siegel, no reasonable jury could find evidence of discrimination on the basis of *age* against *Mrs. Siegel* from Mr. Cowen's purported statement. In the context of the statistics, and the witness' ~~own~~ words, such a finding would be rank speculation.

This leaves a record in which the only credible evidence of discrimination that a jury could consider is the fact that on one

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[3] He admits having said, "that dog won't hunt", which is a common, regional Texas expression for an unworkable situation, frequently used by President Johnson, for example.

[4] Mrs. Seigel's testimony that unidentified others also said it is inadmissible hearsay, *Carden v. Westinghouse Elec. Co.*, 850 F.2d 996 (3rd Cir. 1988).

hand the prior performance evaluations were adequate and on the other that defendant did not specify a reason for plaintiff's termination until after litigation commenced. Particularly in light of the statistical evidence in this case, we believe that the District Judge was correct and the Third Circuit wrong: no reasonable jury could return a judgment for the plaintiff on this record. Thus, summary judgment was properly granted by the district court and improperly reversed by the Third Circuit.

We therefore urge this Court to review this decision so that the law in the Third Ciruit can be made to conform to the teachings of this Court.

CONCLUSION

For the foregoing reasons, we respectfully request that this Court grant a writ of certiorari and reverse the judgment of the Third Circuit.

Respectfully submitted,

MICHAEL A. LAMPERT

APPENDIX

Pearl SIEGEL, Plaintiff-Appellant,

v.

ALPHA WIRE CORPORATION, a New Jersey Corporation and Philip R. Cowen, individually and in his capacity as President and Chief Executive Officer of Alpha Wire Corporation, Defendants-Appellees.

No. 89-5674.

United States Court of Appeals,

Third Circuit.

Argued Jan. 8, 1990.

Decided Jan. 12, 1990.

On Appeal from the United States
District Court for the
District of New Jersey
D.C. Civil No. 88-0397

Reversed and remanded.

894 F.2d 50, 51 Fair Empl.Prac.Cas. (BNA) 1360, 52 Empl. Prac. Dec. P 39,582, 58 U.S.L.W. 2463

Patrick M. Stanton (argued), Sandra L. Bograd, and Stephanie Whitecotton, Shanley & Fisher, P.C., Morristown, N.J., for plaintiff-appellant.

Michael A. Lampert (argued) and Bruce H. Gieseman, St. John, Oberdorf, Williams, Edington & Curtin, Newark, N.J., for defendants-appellees.

Before GIBBONS, Chief Judge, and SCIRICA, Circuit Judge, and WALDMAN, [FN*] District Judge.

FN* Hon. Jay C. Waldman, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

GIBBONS, Chief Judge:

Pearl Siegel appeals from a summary judgment in favor of her former employer, Alpha Wire Corporation ("Alpha") and Philip R. Cowen, Alpha's President and Chief Executive Officer, in her action alleging that the defendants terminated her employment with Alpha in violation of the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C.A. §§ 621-34 (West 1985 and Supp.1989). Siegel also alleged pendent causes of action under the New Jersey Law Against Discrimination, N.J.S.A. s 10:5-1 et seq., as well as ten state common law grounds. In an amended answer, the defendants asserted state-law counterclaims based on information they learned during discovery.

The district court granted the defendants' motion for summary judgment and, because there is no diversity of citizenship in this case, dismissed Siegel's pendent state-law claims and the counterclaims. We will reverse.

I.

Siegel is a citizen and resident of New Jersey. Alpha is a New Jersey corporation with its principal place of business in Elizabeth, New Jersey. Philip Cowen is a citizen and resident of New York.

Siegel was employed by Alpha from August 30, 1966 until she was fired on February 18, 1987. At the time of her termination, she was 63 years old. Siegel's first position with Alpha was as a clerk. She worked her way to the position of Senior Buyer, which she held for three and a half years before she was fired. At the time she was discharged, her job included purchasing requisitioned supplies, and assisting in the selection of appropriate vendors. She also administered a program under which the company leased automobiles, and maintained a list of employees who would thereafter purchase the automobiles from Alpha.

Siegel alleges that she was replaced by Jay Surujnath, a twenty-nine year old maintenance clerk with no experience in the purchasing area. In their answer to interrogatories, the defendants state that her duties were spread between Surujnath and another employee, Phillip Hanna, who was forty years old and had a college degree in marketing. (App. 212).

In July 1986, defendant Philip R. Cowen became Alpha's president and chief executive officer. Cowen stated that, during 1985 and 1986, Alpha's "sales, earnings, market share and employee morale had deteriorated significantly." He also stated that "Alpha sustained losses in each of those years and, by mid-1986 was in default under its bank loan agreements." (App. 181).

On February 18, 1987, Siegel was terminated at the direction of Cowen by her immediate supervisor, then Director of Purchasing for Alpha, Edward Czerniawski. Czerniawski allegedly told Siegel that "Cowen wants you out now. He wants to upgrade the position." (App. 163-64).

Siegel relies on the deposition testimony of Czerniawski, who stated that she received good evaluations during her employment, that she was "better than average" in ability, and that she was a "highly motivated individual." (App." 184). Czerniawski also testified that at no time did he find that Siegel's job skills were wanting. (App. 185).

Siegel testified about Cowen that, although he never said so to her, "it was a noted fact throughout the company that he – like he said, that being older is no percentage for the company, that he wanted younger people, that they were swifter." (App. 162A).

Siegel contends that Cowen used the phrase "old dogs don't know how to hunt" and that this indicates age bias. Czerniawski also testified that Cowen used the expression, in connection with "[s]ome of the senior people at Alpha Wire who were associated with the previous management". (App. 189). Cowen responded by stating that he uses the phrase "that dog won't hunt", which is a Texan expression which "refers to a losing proposition" and has nothing to do with age. Cowen is from Texas. (App. 83).

After the initiation of this litigation, Cowen offered his reasons for firing Siegel. He claimed that Siegel's termination was part of a plan to reverse Alpha's declining profits by discharging incompetent employees, stating that he "lost confidence in her ability and loyalty to the corporation". (App. 81-83). One of the reasons for this loss of confidence was an occasion when he asked Siegel to provide him with the name and address of a company which supplied goods to Alpha, as he wanted to purchase something for himself from that company. Siegel responded by offering to have Alpha's carpenter manufacture an item using goods from Alpha's stock. Cowen stated that this incident caused him to doubt Siegel's loyalty to Alpha. (App. 82).

Cowen gave as an additional reason for his loss of confidence in Siegel the fact that he was informed by Alpha's corporate controller that Siegel had participated in a scheme whereby company automobiles were being "authorized for sale by Alpha to a select group of employees in violation of Alpha's policies, with unauthorized repairs being done prior to sale, and without competitive bidding, at prices below the fair market value." (App. 82).

Siegel argues that the fact that eight individuals within the protected age group were fired during the first three months of 1987 is indicative of age discrimination. In response to an interrogatory asking for information about employees discharged

or demoted within the past three years, the defendants submitted a list of twenty-three individuals, twelve of whom were in the age group protected by the ADEA, and eleven of whom were not. It is unclear on what date the interrogatory was answered. (App. 209-212). The defendants also point to a log of 'Terminated Employees – Layoffs' which shows that from the period from July 1986 to April 1987, fifty-four employees were terminated, only 18 of whom were in the age group protected by the ADEA. (App. 230-34).

Alpha's financial statements for 1985 and 1986 show losses of $84,000 and $1,436,000 respectively. Siegel relies on testimony in a related age discrimination suit against Alpha to suggest that Alpha's financial situation was not as dire as Cowen asserts. In the related case, a former vice-president and chief financial officer of Alpha, Anthony Damiano, testified that Alpha's financial picture was healthier than portrayed by Cowen and by the company's financial statements. Damiano testified that the loss of $1,436,000 on Alpha's financial statement for the fiscal year 1985-1986 was made up of three items: i) the present value of future payments under a contract with the former president; ii) a "provision made for certain assets which were deemed to be not usable in the corporation," which was made part of the financial statements "at the direction of Mr. Phil Cowen."; and iii) a charge "called relocation expenses" which in Damiano's opinion were amounts spend on the "relocation of Mr. Phil Cowen from Dallas". (App. 173). He also testified that the loss appearing on the 1986 statement was increased because the company changed its accounting methods in 1986. Damiano stated that, if these "unusual" items had not been included in the statements, and the accounting methods had not been changed, Alpha's books would have shown a gain of $448,000 for that year. (App. 174).

II.

The analytical framework for ADEA claims is by now familiar. A plaintiff has the initial burden of establishing a *prima facie* case, which, if credited, raises an inference of unlawful

discrimination. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). To do so, a plaintiff must establish (1) that she was a member of the class protected by the ADEA, (2) that she was qualified for the position from which she was discharged, (3) that she was discharged despite those qualifications, and (4) that the position was then filled by a person sufficiently younger to permit an inference of age discrimination. *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 (3d Cir. 1988).

If the plaintiff establishes a prima facie case, the burden of production then shifts to the defendant to articulate a "legitimate, non-discriminatory reason" for its action, which will dispel the presumption of discrimination inherent in a *prima facie* case.[1] *McDonnell-Douglas*, 411 U.S. at 802. If the defendant succeeds, the plaintiff (who at all times retains the burden of ultimate persuasion) must prove by a preponderance of the evidence that the reasons articulated by the defendant for its actions were not the true reasons. *Bruno v. W.B. Saunders Co.*, 882 F.2d 760, 764 (3d Cir. 1989); *Sorba v. Pennsylvania Drilling Co.*, 821 F.2d 200, 202 (3d Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988).

To withstand a motion for summary judgment, however, a plaintiff need not, of course, actually carry this burden. A trial court may enter summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file,

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[1] A defendant's articulation of a legitimate reason for her actions does not mean that a plaintiff's prima facie case has no further significance. It merely dispels any presumption of discrimination. As the Supreme Court stated:

> A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, this evidence and inferences properly drawn therefrom may be considered by the trier of fact on the issue of whether the defendant's explanationis pretextual.
>
> *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255 n. 10 (1981).

together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (en banc), *cert. dismissed*, 483 U.S. 1052 (1987).[2]

To defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory animus, a plaintiff who has made a prima facie showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.

Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 205 (3d Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988). The plaintiff is not required to produce evidence which "necessarily leads to the conclusion that the employer did not act for discriminatory reasons." Id.

In this case, the district court held that Siegel had produced sufficient evidence to establish a prima facie case of age discrimination, because there was no dispute as to the fact that Siegel was in the protected age category and that she was terminated and replaced by one individual more than thirty years younger and another individual twenty-three years younger. The defendants disputed that Siegel was performing her job satisfactorily at the time of her discharge, pointing to the alleged instances of her disloyalty to Alpha articulated by Cowen. The district court held nevertheless that these instances did not negate Siegel's showing that she had received satisfactory performance ratings during her twenty-one years of employment with Alpha, and Czerniawski's testimony that Siegel was a "better than average employee." (App. 14-15).

The court went on to hold that the defendants had proffered legitimate business reasons for Siegel's discharge, stating, with respect to the two alleged instances of Siegel's disloyalty:

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[2] The defendants argue that we should overrule *Chipollini*. Of course we do not have the power to do so – a panel of this court may not overrule a decision of another panel. In addition, *Chipollini* was decided by this court sitting in banc, which makes doubly frivolous this invitation to overrule it.

> Whether or not Siegel believed her actions to be proper, and she believes they were, Cowen believed them to be improper. As a result, he became convinced that she was not a suitable employee at a time when termination decisions were being made with the goal of company survival. . . . Cowen is entitled to exercise his business judgment in making a decision to terminate, whether he is eventually proven to have been right or wrong, as long as he harbors no discriminatory animus in doing so. (App. 15).

The court then held that Siegel had failed to produce evidence which, if credited, would show by a preponderance of evidence that Cowen's proffered reasons were merely a pretext for discrimination. The court stated: "Cowen's use of the phrase 'old dogs won't hunt' does not create a reasonable inference that Siegel was terminated for reasons other than legitimate business reasons," because the only admissible evidence regarding Cowen's use of the phrase came from Czerniawski, who testified only that Cowen used the phrase in connection with two employees other than Siegel. Thus, the court determined, "Czerniawski's testimony concerning the phrase itself and the context in which it was used by Cowen does not even suggest that Cowen was referring to individuals forty years of age or older in general or Siegel in particular—and he was a fan of Siegel, not of Cowen." (App. 18).

The court also decided that Czerniawski's testimony that Cowen directed him to fire Siegel in order to "upgrade" the position did not raise an inference that Cowen's later articulated reasons were pretextual. The court stated that if Cowen believed he had grounds to fire Siegel, the replacement of her "would, almost by definition, be, at least in his view, an upgrade of the position." (App. 19).

Finally, the court held that Siegel's evidence as to the termination of eight other individuals in the protected age group during the first three months of 1987 did not establish a pattern of discharge of older employees. The court noted that the exhibit to which Siegel referred for this evidence showed that

twelve individuals within the protected age group were fired between July 1986 and December 1987, but also that eleven individuals outside the protected age group were fired. This, the court stated was "not statistically significant." (App. 19-20).

III.

We agree with the district court that Siegel successfully made out a *prima facie* case of age discrimination. Defendants attempt to argue that this holding was erroneous because Cowen "has declared that his business decision to terminate Siegel was not motivated by a discriminatory animus", and "[t]o meet this evidence Siegel has presented only stale performance evaluations." (Brief for Appellees at 20). This argument, however, goes to the issue of whether the defendants have demonstrated a legitimate business reason for the discharge and whether Siegel can demonstrate that this reason is pretextual, not to the initial question of whether Siegel made out a *prima facie* case.

The district court correctly held that Siegel's age, the fact that she was replaced by one or two significantly-younger individuals, her satisfactory performance ratings, and Czerniawski's testimony that she was a "better than average" employee, all establish a prima facie case.

IV.

When reviewing a grant of summary judgment, an appellate court is required to apply the same standards as the District Court. *Chipollini*, 814 F.2d at 896; *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977). Thus, the question we must resolve is whether Siegel has produced enough evidence to support an inference that the reasons articulated by Cowen for her discharge are pretextual.

This case is a close one, but we believe that the grant of summary judgment was erroneous. If a jury were to credit Siegel's evidence that Cowen more than once used the phrase "old dogs

won't hunt", this, along with the fact that she had received good evaluations from Czerniawski and that Cowen articulated the reasons now alleged to be his motivation for firing Siegel only after she filed suit, could support a verdict in her favor. This is all that need be determined for Siegel to withstand the defendant's motion for summary judgment.

Rather than examining the evidence and determining whether or not it *could* reasonably support a jury finding of pretext, however, the district court drew a number of inferences from the evidence, resolving for itself issues which should properly have been left to a jury to decide. As did the district court in *Chipollini, supra*, the trial court here "erred in weighing competing inferences and in resolving disputed facts." 840 F.2d at 900.

For example, the court decided that Czerniawski's testimony concerning the phrase "old dogs won't hunt" and the context in which it was used "does not even *suggest*" that Cowen was referring to individuals in the protected age group. (App. 18) (emphasis added). To the contrary, a jury could find that Czerniawski's testimony that Cowen used that phrase when referring to "[s]ome of the senior people at Alpha Wire who were associated with the previous management" indicated a bias against older employees. Of course, a jury could "also decide, as did the district court, that the phrase only indicated dissatisfaction with employees associated with the previous management of Alpha, but this is precisely the sort of question which must be left to the jury.

In addition, the court determined that Czerniawski's testimony that Cowen directed him to fire Siegel in order to "upgrade" the position was not inconsistent with his proffered reasons for discharging her. (App. 19). Whether or not upgrading a position is consistent with discharging an employee for disloyalty and incompetence, however, is again a question for a jury to decide.

As this court reaffirmed in *Chipollini*, a plaintiff may meet her burden of showing that a defendant's proffered reason is

"merely a fabricated justification for discriminatory conduct. . . . 'either directly by persuading the court that a discriminatory reason more likely motivated the employer or *indirectly by showing that the employer's proffered reason is unworthy of credence.*'" 814 F.2d at 898 (quoting *Burdine, supra*, 450 U.S. at 257). Siegel places emphasis on the fact that Cowen stated only that he wanted to upgrade the position at the time she was fired and alleged that she showed disloyalty only after this case was filed, maintaining that this indicates that the latter reasons are not the real ones. She also argues that the exaggeration of Alpha's financial problems supports an inference that she was not fired for incompetence.

While *post hoc* explanations do not by themselves create a factual dispute about whether an explanation is pretextual, *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1215 (3d Cir. 1988), inconsistencies in performance evaluations prior and subsequent to an employee's termination may support an inference of pretext. *See, e.g., Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108, 1117 (3d Cir. 1988), *cert. denied*, ____ U.S. ____, 109 S.Ct. 3213 (1989). Czerniawski's good evaluation of Siegel, together with an alleged remark by Cowen early in their acquaintance that, "if I had ten more Pearls I'd have it made", (App. 153), could be found by a jury to indicate that the reasons later given for her discharge—offered as they were in the face of an age-discrimination suit—were pretextual.

The district court stated that Siegel's proffered evidence as to the discharge of other employees was "not statistically significant". As the court correctly noted, however, this is not a disparate impact case. Siegel appears to rely not so much on pure statistical evidence, but more on the specific circumstances of individual instances of employees being discharged, alleging that there is "a series of terminations and rehirings that are highly indicative of age discrimination." (Reply Brief for Appellant at 6). She asserts that the termination of a number of senior employees in the protected age group and associated with the previous management of Alpha indicates that they and she were discharged because of age-discrimination. This may not be a particularly strong argument, but, as already stated, Siegel has

put forward enough evidence to warrant her case going to a jury, and this may have some relevance.

Likewise, Siegel's argument that Cowen's alleged manipulation of financial statements was to "provide a smokescreen for his discriminatory practices", (Reply Brief for Appellant at 8), may not ultimately be convincing, but that is a question which, in light of the other evidence offered by Siegel, must be determined by a jury.

V.

Because summary judgment was inappropriate in this case, we will direct that the pendent state law claims dismissed by the district court be reinstated. The defendants themselves requested that, if this court determined that summary judgment should not have been granted, the state claims and counterclaims be "returned to the district court because they were the subject of motions to dismiss or for summary judgment that [the district court] did not rule on." (Brief for Appellees at 21).

VI.

For the foregoing reasons, the judgment of the district court will be reversed, and the case remanded for further proceedings, with directions for the district court to reinstate Siegel's pendent state-law claims and the defendants' counterclaims.

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

PEARL SIEGEL,	:	
Plaintiff,	:	Civil Action No. 88-397 (MTB)
v.	:	
ALPHA WIRE CORPORATION, a New Jersey Corporation and PHILIP R. COWEN, individually and in his capacity as President and Chief Executive Officer of ALPHA WIRE CORPORATION,	:	*OPINION*
Defendants.	:	

BARRY, District Judge

Plaintiff Pearl Siegel instituted this action against her former employer, Alpha Wire Corportion ("Alpha"), and against Alpha's President and Chief Executive Officer, Philip R. Cowen, alleging discrimination based on age in violation of the Age Discrimination in Employment Act, 28 U.S.C. § 621, *et seq.* ("ADEA"). The complaint also alleges a cause of action under the New Jersey Law Against Discrimination, N.J.S.A. § 10:5-1, *et seq.* ("NJLAD"), as well as ten state common law grounds. Defendants now move for summary judgment. That motion will be granted.

FACTS

Siegel was employed by Alpha for approximately twenty-one years beginning on August 30, 1966 and ending on the event of her termination on February 18, 1987 when she was 63 years of age. An at-will employee, Siegel held various positions during that time, having been hired as an hourly clerical worker and risen to the position of Senior Buyer of Services and Materials, which position she held for the last three and one-half years of her employment. As a Senior Buyer, Siegel was responsible for purchasing requisitioned supplies and selecting appropriate vendors in the operating materials area. Additionally, Siegel leased cars for the company and maintained a list of employees who would thereafter purchase them from the company with Siegel having some responsibility for those sales. Over the course of her employment, Siegel was given good performance evaluations, promotions and salary increases. Czerniawski Dep. at 80-81.[1]

In July of 1986, in connection with a possible sale of the company, Cowen became President and Chief Executive Officer ("CEO") of Alpha. Cowen Declaration at ¶ 4.[2] Cowen states that:

> During fiscal 1985 and 1986, Alpha's sales, earnings, market share and employee morale had deteriorated significantly. Alpha sustained losses in each of those years and, by mid-1986, was in default under its bank loan agreements.

Id. at ¶ 3. Cowen claims that he was hired to reverse the negative trends at Alpha and to turn the corporation around. *Id.* at ¶ 4.

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[1] Defendants argue for suppression of the depositions of Czerniawski, Anthony Viscardi and Anthony Damiano, based upon plaintiff's failure to have given adequate prior notice of the depositions. Although Siegel has not produced evidence to counter this claim, I will assume for purposes of this motion only that this deposition testimony would be admissible at trial.

[2] In December of 1986, Cowen lead a leveraged buy out of Alpha, thereby gaining control of Alpha and Alpha Wire Holding Company.

Cowen became convinced that a major cause of Alpha's decline was due to poor customer service, resulting in a loss of customers to major competitors, and believed it imperative that Alpha "improve the overall poor management of systems, techniques and controls utilized in the purchasing, inventory and materials departments." *Id.* at ¶ 5. One of his goals was to strengthen the then-present management team. *Id.* at ¶ 6. By the end of 1986, however, it became clear that his entire staff and many lower-level employees were incapable of reversing Alpha's decline. "Consequently," he states, "in accordance with generally accepted management practices, those employees were discharged. *Id.* at ¶ 10.

On February 17, 1987, Cowen ordered Edward Czerniawski, Director of Purchasing, to terminate Siegel's employment with Alpha. Siegel's duties were apparently spread between two men—a man over thirty years her junior who had no background or skills in the purchasing area and received on-the-job training, Czerniawski Dep. at 96, and a man forty years of age with a college degree in marketing. (Plaintiff's App., Tab 7, Exh. A).

Siegel charges Cowen and Alpha with having terminated her employment on the basis of age. She points to eight instances in early 1987 (including her own termination) where individuals forty years of age or older were fired from Alpha and replaced with individuals not in the protected age category. *See* Plaintiff's Opposition Brief at 4-5 (citing Defendant's Answers to Interrogatories No. 7, Exhibit A to Plaintiff's Exhibit 7 in Opposition). Siegel also claims that she had been told that Cowen used the phrase "old dogs do not know [sic] how to hunt". Siegel Dep. at 82, Exhibit D to Lampert Declaration. In his deposition testimony, Czerniawski states that Cowen used the phrase "old dogs won't hunt" during informal meetings to refer to "[s]ome of the senior people at Alpha wire who were associated with the previous management" albeit not with reference to Siegel. Czerniawski Dep. at 88. "[H]e just questioned individuals within the company." *Id.* at 89. When Siegel herself was asked at deposition if she had any facts that led her to believe that anyone at Alpha treated her improperly because of her age—whether with

regard to her termination or anything else—she pointed only to the summary manner of her termination and Cowen's statement to Czerniawski that he wanted to "upgrade the position" Siegel Dep. at 72-73.

Defendants contend that Siegel was terminated, not because of her age, but because Cowen lost confidence in her ability and her loyalty to the corporation. Cowen Declaration at ¶ 8; Def. Br. at 9. They cite the following instances of disloyalty:

> (1) On one occasion, Cowen asked Siegel to provide him the the name of a company that supplied certain goods to Alpha so that the supplier could be contacted regarding a purchase for Cowen's personal use. Siegel responded by "offering to have the company carpenter manufacture the item using goods from Alpha's supply stock."
>
> (2) Cowen was informed by Alpha's Controller that certain employees, including Siegel, were involved in a practice of authorizing company automobiles for sale "to a select group of employees in violation of Alpha's policies, with unauthorized repairs being done prior to sale, and without competitive bidding, at prices below their fair market value."

Cowen Declaration at ¶¶ 8-9.[3] Defendants contend, as well, that the corporation's survival mandated that there be a

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[3] Defendants also contend that, during discovery in this matter, they became aware of at least four free winter vacations taken by Siegel at the Florida "Guest House" apartment of an Alpha supplier, and argue that acceptance of a "commercial gratuity" of this kind violates Alpha policy. *See* Defendants' Moving Brief at 5. Because defendants believe that Siegel's acceptance of the vacations may form the basis for a claim against her, and because they are convinced that other as yet unasserted claims exist they have moved for an order granting leave to file a First Amended Answer and Counterclaim. That motion is presently pending before the Hon. Stanley R. Chesler. However, because the matter of Siegel's alleged illicit vacations was not discovered until well after her termination, it cannot be relied upon by defendants to support their claim that Siegel was terminated for non-discriminatory reasons.

housecleaning and that Siegel was one of the many employees who were let go to reverse the decline.

DISCUSSION

Siegel's discrimination claim is based on the federal Age Discrimination in Employment Act of 1967, which makes it unlawful for an employer to:

> fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges or employment because of such individual's age.

29 U.S.C. § 623(a)(1). A plaintiff bears the ultimate burden of demonstrating the employer's discriminatory intent by showing that "age was a determinative factor" in the employment decision. *White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988); *Anastasio v. Schering Corp.*, 838 F.2d 701, 705 (3d Cir. 1988); *Turner v. Schering-Plough Corp.*, 705 F. Supp. 1048, 1050 (D.N.J. 1989). He or she need not establish that age was the determinative factor, only that it made a difference in the employer's decision. *Chipollini v. Spencer Gifts, Inc.* 814 F.2d 893, 897 (3d Cir. 1987); *Cherchi v. Mobil Oil Corp.*, 693 F. Supp. 156, 161 (D.N.J. 1988).

Generally, in pursuing an ADEA claim, a plaintiff bears the initial burden of establishing a prima facie case of discrimination. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Massarsky v. General Motors Corp.*, 706 F.2d 111, 117 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983) (quoting *Smithers v. Bailar*, 629 F.2d 892, 892 (3d Cir. 1980)). To do so in this case, Siegel must establish that:

> (1) she belongs to the protected class (i.e. that she was forty years of age or above);
>
> (2) she was performing satisfactorily in her position with Alpha and was actually or constructively dismissed; and

(3) an individual sufficiently younger to raise an inference of age discrimination was employed in her stead.

Healy v. New York Life Ins. Co., 860 F.2d 1209, 1214 (3d Cir. 1988); *Spangle v. Valley Forge Sewar Authority*, 839 F.2d 171, 173 (3d Cir. 1988) (citing *Maxfield v. Sinclair*, 766 F.2d 788, 795 (3d Cir. 1985), *cert. denied*, 474 U.S. 1057)).

Once Siegel has established a prima facie case, the burden shifts to defendants to dispel the presumption of discrimination by articulating a legitimate, non-discriminatory reason for the action taken. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981); *Massarsky* at 118 (citing *McDonnell-Douglas*, 411 U.S. at 802). If defendants proffer a lejgitimate business reason, Siegel may still prevail if she can prove that defendants' assertions are pretextual and that she was, in fact, the subject of intentional discrimination. *See Burdine* at 248.*

Pretext may be demonstrated through the use of either direct or indirect evidence. *Burdine*, 450 U.S. at 248. Thus, plaintiff's final burden may be met either "directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proferred explanation is unworthy of credence." *Id.* at 256; *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 898 (3d Cir.), *cert. dismissed*, 108 S. Ct. 26 (1987). A defendant seeking to overcome an allegation of pretext must show "that plaintiff will be unable to introduce either direct evidence of a purpose to discriminate, or indirect

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* Where direct evidence of a discriminatory intent is available, a plaintiff need not resort to the tripartite framework developed in *McDonnell-Douglas* and, thus, is not required to raise an inference of discriminatory animus by establishing a prima facie case. *White v. Westinghoue Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988); *Chipollini*, 814 F.2d at 897. Rather, if direct evidence of a discriminatory intent is presented, "problems of proof are no different than in other civil cases." *Chipollini* at 897 (citing *Gavalik v. Continental Can Co.*, 812 F.2d 834, 853-54 (3d Cir. 1987)). Nonetheless, a plaintiff's burden remains the same, i.e. to establish that a defendant's proferred reason for termination is a mere pretext. *See Chipollini* at 897-98.

evidence of that purpose by showing that the proferred reason is subject to factual dispute." *Chipollini* at 899. Thus, in the context of an ADEA claim:

> [A] defendant may prevail on a summary judgment motion in alternate ways. The defendant may show that the plaintiff can raise no genuine issue of fact as to one or more elements of the plaintiff's prima facie case. The defendant may also introduce evidence of a nondiscriminatory animus and show that the plaintiff can raise no genuine issue of fact as to whether the proferred reason is a pretext for discrimination.

Spangle, 839 F.2d at 173 (citing *Chipollini* at 893).

It is not disputed that Siegel was within the protected age category, nor that she was terminated and her duties assumed by an individual more than thirty years her junior and one who was forty years old. Defendants do dispute Siegel's claim that she was, at the time of her termination, performing her job duties satisfactorily and, therefore, assert that she is unable to make out a prima facie case of discrimination. They point to the instances of "disloyalty" articulated by Cowen and attempt to establish, thereby, that Siegel was not qualified to remain employed in her position at Alpha.

Two instances of allegedly disloyal conduct do not negate Siegel's showing that she was performing satisfactorily in her position. Indeed, for twenty-one years, she received satisfactory performance ratings and Czerniawski described her as a "better than average employee." Dep. at 21, 80. Because I believe that, even assuming the alleged acts of disloyalty occurred, Siegel was satisfactorily performing the duties assigned to her as a Senior Buyer, I find that she has made out a prima facie case of age discrimination.

A prima facie case having been established, the burden of production shifts to the defendants to come forward with some legitimate, non-discriminatory reason for the employment decision made by Cowen. *Burdine*, 450 U.S. at 252. Citing the two

instances referred to earlier, defendants argue that these instances demonstrate Siegel's disloyalty and disregard for company policy, and, in turn, show her as being unable to function as an Alpha employee.

Whether or not Siegel believed her actions to be proper, and she believes that they were, Cowen believed them to be improper. As a result, he became convinced that she was not a suitable employee at a time when termination decisions were being made with the goal of company survival. Contrary to Siegel's assertions, Cowen is entitled to exercise his business judgment in making a decision to terminate, whether he is eventually proven to have been right or wrong, as long as he harbors no discriminatory animus in so doing. *Healy*, 860 F.2d at 1216; *Hankins v. Temple University*, 829 F.2d 437, 441 (3d Cir. 1987). Courts do not have the right, under the guise of ADEA jurisdiciton, to second-guess employment decisions or to substitute the court's own business judgment for that of the employer. *Healy* at 1216; *accord Thornburgh v. Columbus & Greenville Railroad Co.*, 760 F.2d 633, 647 (5th Cir. 1985).

Moreover, it is not disputed that Alpha was in a state of decline and in default under its bank loan agreements when Cowen took over as President and CEO in July of 1986, although plaintiff suggests that Alpha's financial condition was "far from calamitous" at the time of plaintiff's termination (Pl. Br. at 16). Cowen quickly came to attribute much of the negative trend to the existing "*ancien regime*" at Alpha and determined that a major change in personnel was warranted. Cowen Declaration at ¶ 10. Defendants contend that the wisdom of Cowen's decisions in this regard has been borne out by subsequent events, including a significant movement toward profitability, which occurred within nine months of Cowen's extensive staff changes. Def. Moving Br. at 11. Be that as it may, Cowen's "displeasure", Czerniawski Dep. at 87, with plaintiff during a time of general housecleaning and his decision that she should be one of the employees swept out is, unhappily for plaintiff, not a decision I can set aside absent evidence of discrimination.

While defendants have proferred legitimate business reasons for Siegel's discharge, Siegel's ADEA claim may nevertheless survive a motion for summary judgment if she can show, by a preponderence of the evidence, that the reasons offered are merely a pretext for discrimination. *Burdine*, 450 U.S. at 253; *Chipollini*, 814 F.2d at 898.

> To defeat a summary judgment motion based only on a defendant's proffer of a nondiscriminatory animus, a plaintiff who has made a *prima facie* showing of discrimination, need only point to evidence establishing a reasonable inference that the employer's proffered explanation is unworthy of credence.

Sorba v. Pennsylvania Drilling Co., 821 F.2d 200, 205 (3d Cir. 1987).

Attempting to establish pretext, Siegel points to: (1) Cowen's alleged use of the phrase "old dogs won't hunt" to refer to "senior" Alpha employees;[5] (2) Cowen's alleged determination to "upgrade" Siegel's position; (3) a purported discrepancy between the testimony of Cowen and that of Czerniawski regarding the decision to fire Siegel; and (4) Cowen's alleged pattern of firing of employees within the protected age group and his replacement of those employees with significantly younger individuals.

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[5] Siegel testified that "someone" told her that Cowen once used the phrase "old dogs do not now [sic] how to hunt" or words to that effect. Siegel Dep. at 82, Exhibit D to Lampert Declaration filed June 16, 1989. Such evidence, pure hearsay, may not be used to defeat defendants' summary judgment motion. *See United States v. St. John's General Hosp.*, Nos. 88-3700, 88-3748, 88-3749, Slip Op. at 12 (3d Cir. May 24, 1989). Czerniawski's testimony stands on a different footing. Assuming that he will testify at trial that he heard Cowen say "old dogs won't hunt . . .," Cowen's statment to him could be deemed an admission. For purposes of this motion I must assume that Cowen made the statement to Czerniawski. *See Mauter v. Hardy Corp.*, 825 F.2d 1554, 1558 (11th Cir. 1987). Notwithstanding defendants' persuasive evidence regarding the Texas colloquialism, "that dog won't hunt," *see* Defendants' Exhibits 1 & 2, an expression Cowen concediedly used, on a motion for summary judgment all inferences must be drawn in favor of the nonmovant.

The only admissible evidence regarding the phrase "old dogs won't hunt" comes from Czerniawski, who heard the phrase uttered at informal meetings about which he cannot recall specific details. Czerniawski Dep. at 88. Czerniawski understood Cowen to have used the phrase in referece to some of the senior people at Alpha who were associated with and emotionally tied to the previous management. *Id.* Czerniawski explained that Cowen "questioned" (i.e. lacked confidence in) senior management that had been at Alpha prior to his taking over. *Id.* at 88-89. Czerniawski recalls two individuals, John Gallagher and Tony Damiano, being called into question in this regard, but not Siegel. *Id.* at 88-89. He explained that Cowen's problem with Siegel "came from different circumstances. . . ." *Id.* at 89-90. He distinctly recalls Cowen's displeasure with Siegel, "whether he didn't like her personally or whatever." *Id.* at 87-88.

Cowen's use of the phrase "old dogs won't hunt" does not create a reasonable inference that Siegel was terminated for reasons other than legitimate business reasons. *See Sorba*, 821 F.2d at 205. Indeed, Czerniawski's testimony concerning the phrase itself and the context in which it was used by Cowen does not even suggest that Cowen was referring to individuals forty years of age or older in general or Siegel in particular – and Czerniawski was a fan of Siegel, not of Cowen.

Neither does Czerniawski's testimony that Cowen directed him to fire Siegel in order to "upgrade" the position reasonably raise an inference that the employer's reason for termination was a mere pretext. Czerniawski does not explain what Cowen meant by "upgrade." More importantly, Siegel has proferred nothing which demonstrates that the term signifies an intent to permit a younger individual to assume some of her duties. To "upgrade" is "to raise the quality of. . . ." Merriam-Webster, *Webster's Ninth New Collegiate Dictionary* 1296 (1985). If Cowen believed there were adequate grounds for Siegel's termination, his replacement of her would, almost by definition, be, at least in his view, an upgrade of the position.

In further support of her claim of pretext, Siegel contends:

> Finally, and most significant is the conflict between Mr. Cowen's sworn testimony that Mr. Czerniawski decided to terminate Mrs. Siegel and Mr. Czerniawski's sworn testimony that Mr. Cowen ordered him to terminate Mrs. Siegel [over] his protest.

Plaintiff's Opposition Brief at 17-18. Nowhere does Siegel cite to, or provide, any statement of Cowen that it was Czerniawski who made the decision to terminate and it is clear, at least to me, that is was Cowen who made the judgment call. Cowen Declaration at ¶ 10.

Finally, Siegel's focus is much too narrow with regard to Cowen's termination for performance reasons of eight individuals in the protected age group in the first three months of 1987. In the exhibit to which she refers, twelve individuals within the protected age group (i.e. over forty years of age) were terminated for performance related reasons between July 1986 and December 1987.[6] *See* Plaintiff's App. Tab 7, Exhibit A. During the same time period, however, eleven individuals outside the protected age group (i.e. under forty years of age) were terminated due to performance related reasons, a fact plaintiff neglects to mention. This minor skewing of defendants' terminations toward individuals within the protected category would, I venture to guess, not be statistically significant, and does not reasonably raise an inference of age discrimination much less the "pattern" plaintiff suggests.

And there is more in Tab 7, Exhibit A, which the parties do not address. During the ten month period between July 1986, when Cowen came on board, and April 28, 1987, fifty-four employees are described as "Terminated Employees –

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[6] Five of these individuals were replaced with individuals outside the protected age group, five individuals were not replaced, and two individuals were replaced by two or more persons one of which was in the protected age group.

LAYOFFS."[7] Of these fifty-four employees, only 18 – or one-third – were in the protected age group and other exhibits make it quite clear that many older employees were retained. Thus, even if a disparate impact claim had been articulated, which it has not, plaintiff has simply not shown that a "facially neutral employment practice had a significantly discriminatory impact" or, indeed, a discriminatory impact at all. *Connecticut v. Teal*, 457 U.S. 440, 446 (1982). And, interestingly, during the thirty month period from January, 1984 until June 30, 1986, forty-four employees are described as "Terminated Employees – LAYOFFS" with only four of those terminated prior to 1985, when the company last operated at a profit. Clearly, the terminations accelerated as Alpha's financial picture grew bleaker.

Accordingly, Siegel's age discrimination claim under the ADEA will be dismissed. Because Siegel's federal claim is being dismissed before trial, I will, pursuant to *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), dismiss the remaining pendent state law claims as well. Where a federal claim is disposed of on summary judgment, "the court should ordinarily refrain from exercising jurisdiction in the absence of extraordinary circumstances." *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 196 (3d Cir. 1976); *see also Hewlett v. Davis*, 844 F.2d 109, 115 (3d Cir. 1988). Siegel has not argued that extraordinary circumstances exist.

An appropriate order will issue.

/s/ Maryanne Trump Barry

Maryanne Trump Barry
U.S.D.J.

Dated: July 25, 1989

[7] Three names appearing on the list of twenty-three performance related terminations appear as well on the "Terminated Employees – LAYOFFS" list and have not been included as part of the fifty-four employees so described.

No. 89-1589

In The

Supreme Court of the United States

October Term, 1989

ALPHA WIRE CORPORATION, A NEW JERSEY CORPORATION AND PHILIP R. COWEN, INDIVIDUALLY AND IN HIS CAPACITY AS PRESIDENT AND CHIEF EXECUTIVE OFFICER OF ALPHA WIRE CORPORATION,

Petitioners,

v.

PEARL SIEGEL,

Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF THE CASE

On January 20, 1988, plaintiff, Pearl Siegel filed a Complaint alleging discharge on the basis of age in violation of the Age Discrimination Employment Act, 29 U.S.C. § 621, *et seq.* ("ADEA"), along with pendent state claims arising from her termination, against defendants Alpha Wire Corporation ("Alpha Wire") and Philip R. Cowen ("Cowen") individually and in is his capacity as President and Chief Executive Officer of Alpha Wire. Defendants moved on June 16, 1989 to dismiss or for summary judgment on all counts of the Complaint. On June 26, 1989, plaintiff filed a brief in opposition to the defendants motion to dismiss or for summary judgment. With respect to this motion, oral argument was heard on July 24, 1989 before United States District Court Judge Maryann Trump Barry ("Judge Barry"). On July 25, 1989, Judge Barry issued an opinion and order granting defendant's motion for summary judgment on plaintiff's, ADEA claim and dismissing the remaining pendent state claims.

On August 17, 1989, plaintiff filed a Notice of Appeal to the Third Circuit Court of Appeals. On January 8, 1990, the case was argued before the Third Circuit Court of Appeals before a panel consisting of Chief Judge Gibbons, Circuit Judge Scirica and District Judge Waldman. An opinion authored by Chief Judge Gibbons was issued on January 12, 1990. *Siegel v. Alpha Wire Corp.*, 894 F.2d 50 (3rd Cir. 1990). The Court of Appeals reversed the District Court's grant of summary judgment and remanded the case for further proceedings, with directions for the District Court to reinstate plaintiff's pendent state law claims and defendant's counterclaims. On April 10, 1990, defendants filed a petition for a

writ of *certiorari* to the United States Court of Appeals for the Third Circuit. Plaintiff opposes that writ.

The Court of Appeals as well as the District Court held that plaintiff Siegel had successfully made out a *prima facie* case of age discrimination under the ADEA. The District Court held, and the Court of Appeals affirmed, the finding that Siegel's age, the fact that she was replaced by one or two significantly younger individuals, her satisfactory performance ratings and Czerniawski's testimony that she was a "better than average" employee, all establish a *prima facie* case.

The Court of Appeals applied the standards enunciated in *Chipollini v. Spencer Gifts*, 814 F.2d 893 (3rd Cir.) (en banc), *cert. dismissed*, 483 U.S. 1052 (1987) in reviewing this grant of summary judgment. Once having decided that plaintiff had made out a *prima facie* case, the question that had to be resolved by the Court of Appeals was whether, in fact, Siegel had produced enough evidence to support an inference that the reasons articulated by Cowen for her discharge were pretextual. To this end, the Court of Appeals held:

> If a jury were to credit Siegel's evidence that Cowen more than once used the phrase "old dogs won't hunt", this, along with the fact that she had received good evaluations from Czerniawski and that Cowen articulated the reasons now alleged to be his motivation for firing Siegel only after she filed suit, could support a verdict in her favor. This is all that need be determined for Siegel to withstand the defendants' motion for summary judgment.

Siegel, supra at 55.

COUNTERSTATEMENT OF THE FACTS

Plaintiff adopts the factual statement as presented in the Third Circuit Opinion reported at 894 F.2d 50, 51-52 (3d Cir. 1990).

REASONS FOR DENYING THE WRIT

I.

THE THIRD CIRCUIT STANDARD FOR SUMMARY JUDGMENT IN AGE DISCRIMINATION CASES SHOULD NOT BE OVERRULED

In *Chipollini,* the Third Circuit in a well-reasoned opinion held that a plaintiff can withstand a Motion for Summary Judgment without direct evidence specifically relating to age by showing indirectly that the reason for the unfavorable treatment put forward by the employer is pretext. *Chipollini, supra* 814 F.2d at 898. In this regard, the Court's holding is consistent with prior case law. For example, in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089 (1981), the Supreme Court embraced the use, at the pretext stage, of indirect evidence attacking the credibility of defendant's proffered reasons for discharge. *Chipollini, supra* 814 F.2d at 899 (quoting *Burdine, supra* 450 U.S. at 256). In addition, *Chipollini, supra,* did not change the fundamental skeletal analysis concerning the method of proving age discrimination that relies on presumptions and shifting burdens of productions. Moreover, *Chipollini* is consistent with the basic tenets surrounding the use of summary judgment in accordance with the Federal Rules of Civil Procedure and supporting case law. A fair reading of *Chipollini* does not

suggest that summary judgment should be granted sparingly as defendants suggest. Similarly, a fair reading of *Matsushita Electric Industrial v. Zenith Radio*, 475 U.S. 574 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986) does not suggest that summary judgment should be granted liberally. Instead, all of these cases support the basic proposition that the burden to demonstrate the absence of material fact issues remain with the moving party regardless of which party would have the burden of persuasion at trial. These cases hold that summary judgment is appropriate only in the absence of disputed material fact issues.

The message of *Chipollini* is not, as defendants imply, that anyone who suffers an adverse employment decision can win a discrimination suit. Rather, this Court's message as articulated by Chief Justice Rehnquist is:

> When all legitimate reasons for rejecting an application have been eliminated as possible reasons for the employer's action, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on impermissible consideration.

Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). This framework places a premium on truthfulness by the defendant. If a "legitimate, non-discriminatory" reason articulated by a defendant faced with a *prima facie* case of discrimination is not the true reason . . . , the court may infer that the actual reason was impermissible. *Bruno v. W.B. Sanders*, 882 F.2d 760, 766 (3d Cir. 1989).

II

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO THE STANDARD FOR ASSIGNING BURDENS OF PROOF IN AN AGE DISCRIMINATION CASE

Upon reviewing the decisions from other circuits, it is clear based on their positive references to *Chipollini*, that *Chipollini* has broken new legal ground. The First[1], Second[2], Fourth[3], Seventh[4] and Eleventh[5] Circuits have all cited *Chipollini* with approval.

In fact, this Court recently dismissed *certiorari* as improvidently granted in a case challenging the validity of the *Chipollini* standards. *Harbison-Walker Refractories v. Brieck*, Case No. 87-271 12/12/88, 57 LW 4063. In *Harbison*, an ADEA case, the Third Circuit ruled:

> that "the record" in this Age Discrimination in Employment Act case contained evidence of implausibility and inconsistencies in employer's proffered reasons for discharge that could support inference that the employer did not act for non-discriminatory reasons, and therefore, under *Chipollini v. Spencer Gifts*, 814 F.2d 893, 55 LW 2557 (CA 3 1987), employer should not have been granted summary judgment. 57 LW 3028.

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[1] See *Manzel v. Western Auto Supply Co.*, 848 F.2d 327 (1st Cir. 1988).

[2] See *Dister v. Continental Group, Inc.*, 859 F.2d 1108 (2d Cir. 1988).

[3] See *Harris v. Marsh*, 679 F. Supp. 1204 (E.D.N.C. 1981).

[4] See *Grafenhain v. Pabst Brewing Co.*, 827 F.2d 13 (7th Cir. 1987).

[5] See *Sparks v. Pilot Freight Carriers, Inc.*, 820 F.2d 1554 (11th Cir. 1987).

Thus, defendants' suggestion that this action would provide the Court with "an opportunity to address the problem it tried to address three years ago" (see petition for *certiorari*, at page 5) is erroneous. If this Court had any interest in addressing the Third Circuit's reading of *Chipollini* or the Court's other decisions in the area of summary judgment, it could have done so in the *Harbison-Walker* case. This Court specifically chose not to disturb this ruling by dismissing *certiorari* as improvidently granted.

Defendants raised the issue of overruling *Chipollini* at the Third Circuit. As Chief Judge Gibbons noted in his opinion in *Siegel* at footnote 2:

> The defendants argue that we should overrule *Chipollini*. Of course, we do not have the power to do so – a panel of this Court may not overrule a decision of another panel. In addition, *Chipollini* was decided by this Court sitting en banc, which makes doubly frivolous this invitation to overrule it. *Siegel, supra* at 53.

The Third Circuit opinion does not even suggest that it contemplates a need to reverse the *Chipollini* decision. Defendants make much of the Third Circuit calling this a "close case". However, a fair reading of the Third Circuit opinion shows that the phrase "[t]his case is a close one" refers to the factual background of the case not the validity of the *Chipollini* decision. *Siegel, supra* at 55.

CONCLUSION

The Third Circuit's interpretation of the burdens of proof under the Age Discrimination in Employment Act and the application of the *Chipollini* standards for summary judgment to the facts of this case was consistent with the ADEA and with applicable prior decisions in this area. The Third Circuit's decision does not create conflict with any other Circuit as to the standard for summary judgment in an ADEA case.

The Petition in short, should never have been brought before this Court. Plaintiff respectfully requests that this Court deny the petition and decline to issue a Writ of Certiorari in this case.

Respectfully submitted,

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